

**United States Department of Labor
Employees' Compensation Appeals Board**

RUTH E. SMITH, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baltimore, MD, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 04-252
Issued: March 9, 2004**

Appearances:
Ruth E. Smith, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 5, 2003 appellant filed a timely appeal from the August 29, 2003 decision of the Office of Workers' Compensation Programs finding that she failed to establish that she sustained an emotional condition in the performance of duty. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an emotional condition in the performance of duty.

FACTUAL HISTORY

On July 24, 2003 appellant, then a 56-year-old human resource specialist, filed an occupational disease claim alleging that on March 25, 2003 she first realized that her post-traumatic stress disorder was caused by factors of her federal employment. Appellant stopped work on May 5, 2003 and she has not returned to work. Appellant submitted several documents in support of her claim. In a July 24, 2003 narrative statement, appellant stated that

being placed on administrative leave in May 1998, pending removal and being reinstated in March 1999, caused her emotional condition. She further stated that her emotional condition was caused by an April 2003 incident where she received unfair treatment from Michael Masko, an employing establishment injury compensation manager, who issued a letter of warning to her for unacceptable work performance. Appellant noted that she received medical and psychological assistance from the Employee Assistance Program (EAP) and she had used sick leave.

In an undated letter, appellant alleged that her emotional condition was caused by a March 20, 1998 meeting with William (Randy) Caldwell, an employing establishment manager. Appellant stated that while working as an occupational health nurse administrator on March 2, 1998 she was introduced to Mr. Caldwell and during a meeting with her on March 20, 1998 he was confrontational and threatening while advising her that he had previously fired two nurses, that the office was not clean and about his expectations of her. Appellant stated that after this meeting, she received a letter of warning on April 15, 1998 for failure to report an accident timely and on April 21, 1998 for failure to provide accurate data in a timely manner. She also alleged that her emotional condition was caused by an incident on May 20, 1998 where William (Gary) Phelps, an occupational health nurse administrator for the western area, advised her that she was being placed on administrative leave pending removal without being given any reasons for the action and she was escorted out of the building by two employing establishment police officers. On June 8, 1998 appellant received a notice of proposed adverse action dated June 3, 1998 and signed by Mr. Phelps indicating that she was scheduled to be removed. This letter outlined the charges of unsatisfactory work performance based on failing to attend a May 11, 1998 meeting and a review of her unit from May 12 through 15, 1998, that was conducted by Mr. Phelps. Appellant stated that she disagreed with the charges.

Appellant submitted an April 1, 2003 narrative statement alleging she was retaliated and discriminated against on the basis of race and sex by Michael Masko, an employing establishment injury compensation manager. Appellant stated that on March 24, 2003 Mr. Masko issued a letter of warning to her for unacceptable work performance as she failed to comply with standard operating procedures for inputting case information for a workers' compensation case into the human resource information system. Appellant also stated that, during the week March 3 through 7, 2003, she had a heavier workload because a coworker was on sick leave and she had to pull additional files because an audit was being conducted. Further, appellant stated that she was detailed to work in Virginia by Mr. Masko during the week of March 10 through 14, 2003. Appellant stated that on March 20, 2003 she testified on behalf of a coworker who worked for Mr. Masko and the case was subsequently settled in favor of the coworker. She alleged that when Mr. Masko returned to work on March 24, 2003 he retaliated against her for testifying by finding that she did not follow standard operating procedures and in issuing the letter of warning despite the nonexistence of the particular procedure she was accused of violating and receiving notes of thanks from coworkers for a job well done on the case she was questioned about.

Appellant submitted documents regarding a complaint she filed against the employing establishment alleging retaliation for failing to rescind the letter of warning and making her attend a diversity training course on how to get along with people including, an April 16, 2003 settlement agreement between herself and the employing establishment indicating that the letter

would be rescinded in its entirety and removed from all records. Further, she submitted a copy of the March 24, 2003 letter, of warning issued by the employing establishment for unacceptable work performance and her March 31, 2003 letter appealing the letter.

Appellant's husband, Phillip E. Smith, submitted a letter to an EAP representative requesting help in the matter of appellant being placed on administrative leave on May 20, 1998 pending removal by Mr. Phelps. He described his reaction to seeing appellant escorted from the building by two employing establishment police officers and appellant's reaction to this incident. In addition, he noted that an incident two months ago where Mr. Caldwell told appellant something that caused her to become upset. He concluded that the placement of appellant on administrative leave without knowing the charges filed against her had been very stressful not only for appellant, but for their whole family.

A May 5, 2003 letter from Mr. Masko, advised appellant that a May 1, 2003 note that she submitted indicating that she received medical treatment constituted unacceptable medical documentation. Appellant submitted documents regarding her leave under the Family Medical Leave Act.

She also submitted medical evidence including reports, from Sarah Hulbert, Ph.D., a clinical psychologist, dated May 28, June 25 and July 29, 2003, indicating that she agreed with the findings of her primary care physician that she had an anxiety disorder and that she should not work from May 1 through September 1, 2003. A May 29, 2003 report of Dr. Larry Smith, a family practitioner, revealed that appellant suffered from an emotional condition. Dr. Smith's his disability certificate indicated that appellant was seen on May 1, 2003 and that she could return to work on June 1, 2003 pending reevaluation and his medical treatment notes indicated that appellant was being treated for an emotional condition during the period June 2 through September 30, 1998. Medical records from an unknown source indicated that appellant had a uterine fibroid tumor and hypothyroidism.

By letter dated August 21, 2003, Jennifer Green, an employee of the employing establishment's capital metro operations, controverted appellant's claim on the grounds that issuance of the letter of warning constituted an administrative matter and the employing establishment did not err or act abusively in handling this matter. Further, she stated that no probative factual evidence had been submitted establishing that appellant's workload was heavier and that Mr. Masko issued a letter of warning because appellant testified at an Equal Employment Opportunity (EEO) Commission hearing. Ms. Green also challenged the medical evidence submitted by appellant on the grounds that her physicians' opinions were not well rationalized.

By decision dated August 29, 2003, the Office found that the evidence of record insufficient to establish that appellant sustained an emotional condition in the performance of duty.

LEGAL PRECEDENT

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition, for which she claims compensation was caused or

adversely affected by factors of her federal employment.¹ To establish her claim that she sustained an emotional condition in the performance of duty, appellant must submit: (1) factual evidence identifying employment factors or incidents alleged to have caused or contributed to her condition; (2) medical evidence establishing that she has an emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to her emotional condition.²

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the coverage of workers' compensation. These injuries occur in the course of the employment and have some kind of causal connection with it but nevertheless are not covered because they are found not to have arisen out of the employment. Disability is not covered where it results from an employee's frustration over not being permitted to work in a particular environment or to hold a particular position, or to secure a promotion. On the other hand, where disability results from an employee's emotional reaction to his regular or specially assigned work duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.³

In emotional condition cases, the Office must make findings of fact regarding, which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed to be factors of employment and may not be considered.⁴ Therefore, the initial question is whether appellant has alleged compensable factors of employment that are substantiated by the record.⁵

ANALYSIS

In this case, appellant has alleged that she was retaliated and discriminated against by the employing establishment. Actions of an employee's supervisor, which the employee characterizes as discrimination or harassment may constitute a compensable factor of employment. However, for discrimination or harassment to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did, in fact, occur.⁶ Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.⁷

¹ *Pamela R. Rice*, 38 ECAB 838 (1987).

² *See Donna Faye Cardwell*, 41 ECAB 730 (1990).

³ *Lillian Cutler*, 28 ECAB 125 (1976).

⁴ *Margaret S. Kryzcki*, 43 ECAB 496, 502 (1992).

⁵ *Donald E. Ewals*, 45 ECAB 111, 122 (1993).

⁶ *Anna C. Leanza*, 48 ECAB 115 (1996); *Shelia Arbour (Vincent E. Arbour)*, 43 ECAB 779 (1992).

⁷ *See Lorraine E. Schroeder*, 44 ECAB 323 (1992); *Sylvester Blaze*, 42 ECAB 654 (1991).

Appellant's allegations concerning being placed on administrative leave in May 1998, the issuance of letters of warning and removal for unacceptable work performance and failure to report an accident, to provide accurate data in a timely manner and to comply with standard operating procedures⁸ and being required to submit acceptable medical documentation in support of her leave request⁹ involve administrative or personnel matters. However, where the evidence demonstrates that the employing establishment either erred or acted abusively in the handling of administrative matters, coverage may be afforded.¹⁰ Appellant has not submitted any evidence establishing that the employing establishment committed error or abuse in handling the above administrative matters.

Regarding her placement on administrative leave in May 1998 and subsequent removal by the employing establishment, appellant indicated that she was reinstated in March 1999. However, the record does not contain any evidence that the employing establishment committed error or abuse in placing appellant on administrative leave and removing her from employment. Although appellant's husband witnessed appellant being escorted from the building by police officers and described his reaction, as well as that of appellant to this incident, there is nothing in the record to establish that the employing establishment erred or acted abusively in removing appellant from the building. Therefore, appellant has failed to establish a compensable factor of employment under the Act.

Regarding the employing establishment's issuance of the March 24, 2003 letter, to appellant for unacceptable work performance as she failed to comply with standard operating procedures for inputting case information for a workers' compensation case into the human resource information system, an April 16, 2003 EEO settlement agreement between appellant and the employing establishment provided:

"As a complete and final settlement of the subject matter and without prejudice to the position of the parties in any other case and with the understanding that it will not be cited in other proceedings, by the counselee, the counselee's representative (if any) and/or the union, the following resolution has been entered into by the parties. It is mutually agreed between the parties that this matter resolved as follows:

"The letter of warning issued on March 24, 2003 will be rescinded in its entirety and removed from all records."

Although the letter of warning was rescinded, the Board has held that the mere fact that a personnel action was later modified or rescinded, does not in and of itself, establish error or abuse.¹¹ There is nothing in the record to establish that the employing establishment acted abusively or unreasonably in issuing the letters of warning and removal. As appellant has not

⁸ *Barbara J. Nicholson*, 45 ECAB 803 (1994); *Barbara E. Hamm*, 45 ECAB 843 (1994).

⁹ *Joseph C. DeDonato*, 39 ECAB 1260 (1988).

¹⁰ *James W. Griffin*, 45 ECAB 774 (1994).

¹¹ *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

submitted any evidence establishing that the employing establishment committed error or abuse in issuing these letters, she has failed to establish a compensable factor of employment.

Appellant has alleged that Mr. Caldwell was confrontational and threatening during a March 20, 1998 meeting. She did not submit a witness statement to show that Mr. Caldwell acted inappropriately. Since appellant did not submit any evidence to substantiate her claim, the Board finds that she failed to establish harassment as a compensable factor of employment.

Appellant alleged that she was overworked because she had to assume a heavier workload while a coworker was on sick leave, she had to pull additional files for an audit and she was assigned a detail in Virginia. The Board has held that overwork may be a compensable factor of employment.¹² However, in this case, appellant did not submit evidence, such as a witness statement or personnel document, to corroborate her allegation that she was overworked. Therefore, the Board finds that she failed to establish overwork as a compensable factor of employment.

CONCLUSION

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition while in the performance of duty.¹³

¹² *Robert W. Wisenberger*, 47 ECAB 406, 408 (1996).

¹³ Because appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Garry M. Carlo*, 47 ECAB 299, 305 (1996).

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 9, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member